

in each solicitation, the solicitation process will include:

- (1) Disseminating procedures and information governing FDIC's solicitation rules and policies to MWOBs;
- (2) Providing MWOBs technical guidance in the preparation of proposals;
- (3) Allowing qualified MWOBs a 3% price advantage and additional technical consideration for competitively bid services; and
- (4) Providing post-award technical guidance to unsuccessful MWOBs.

§361.9 MWOB joint ventures.

The FDIC encourages the formation of bona fide joint ventures to assist MWOBs in gaining access to FDIC contracting opportunities.

§361.10 Subcontracting.

Consistent with §361.2 of this part, the contractor is required to carry out the FDIC minority and women-owned business contracting policy in the awarding of subcontracts to the fullest extent, consistent with the efficient performance of the awarded contract.

§361.11 Solicitation and awards for legal services.

(a) The Legal Division engages outside counsel primarily to provide legal services for liquidation, conservatorship and receivership activities. Outside counsel is selected on a competitive basis, as defined in the FDIC "Guide for Outside Counsel", P-2100-002-91 ("Guide"), as amended from time to time.

(b) To be retained as outside counsel, law firms must be free of conflicting interests, unless the Legal Division waives those conflicts in writing. Outside counsel must also enter into a Legal Services Agreement with the FDIC and agree to comply with the provisions of the "Guide".

(c) The Legal Division actively seeks to engage firms owned by minorities and women, both directly and in association with other firms. The Legal Division's Minority and Outreach Office provides assistance to minority and women-owned firms, and to minority and women attorneys within other firms, with respect to registration or other matters relating to the retention of outside counsel.

PART 362—ACTIVITIES AND INVESTMENTS OF INSURED STATE BANKS

Sec.

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SOURCE: 57 FR 53234, Nov. 9, 1992, unless otherwise noted.

§362.1 Purpose and scope.

The purpose of this part is to implement the provisions of section 24 of the Federal Deposit Insurance Act (12 U.S.C. 1831a) which sets forth certain restrictions and prohibitions on the activities and investments of insured state banks and their subsidiaries. In addition, consistent with the overall purpose of section 24, it is the intent of this part to ensure that activities and investments undertaken by insured state banks or their subsidiaries do not present a risk to either of the deposit insurance funds, are safe and sound, are consistent with the purposes of federal deposit insurance, and are otherwise consistent with law.

[57 FR 53234, Nov. 9, 1992, as amended at 58 FR 64483, Dec. 8, 1993]

§362.2 Definitions.

For the purposes of this part, the following definitions apply:

(a) *Activity* refers to the authorized conduct of business by an insured state bank. *Activity* as used in connection with the direct conduct of business by an insured state bank includes acquiring or retaining any investment other than an equity investment. *Activity* as used in connection with the conduct of business by a subsidiary of an insured state bank includes acquiring or retaining any investment.

(b) The phrase *activity permissible for a national bank* shall be understood to refer to any activity authorized for national banks under the National Bank Act (12 U.S.C. 21 et seq.) or any other statute. Activities expressly authorized by statute or recognized as permissible

in regulations, official circulars or bulletins issued by the Office of the Comptroller of the Currency or in any order or interpretation issued in writing by the Office of the Comptroller of the Currency will be accepted as permissible for state banks.

(c) An activity is considered to be conducted *as principal* if it is conducted other than as agent for a customer, is conducted other than in a brokerage, custodial, advisory or administrative capacity, or is conducted other than as trustee.

(d) *Bona fide subsidiary* means a subsidiary of an insured state bank that at a minimum:

- (1) Is adequately capitalized;
- (2) Is physically separate and distinct in its operations from the operations of the bank, however, this requirement shall not be construed to prohibit the bank and its subsidiary from sharing the same facility provided that the area in which the subsidiary conducts business with the public is clearly distinct from the area in which customers of the bank conduct business with the bank;
- (3) Maintains separate accounting and other corporate records;
- (4) Observes separate formalities such as separate board of directors' meetings;
- (5) Maintains separate employees who are compensated by the subsidiary, however, this requirement shall not be construed to prohibit the use by the subsidiary of bank employees to perform functions which do not directly involve customer contact such as accounting, data processing and recordkeeping, so long as the bank and the subsidiary contract for such services on terms and conditions comparable to those agreed to by independent entities;
- (6) Has no less than a majority of its executive officers who are neither executive officers nor directors of the bank;
- (7) Has as a majority of its board of directors persons who are neither directors nor executive officers of the bank; and
- (8) Conducts business pursuant to independent policies and procedures designed to inform customers and prospective customers of the subsidiary

that the subsidiary is a separate organization from the bank.

(e) *Company* shall mean any corporation, partnership, business trust, association, joint venture, pool, syndicate or other similar business organization.

(f) *Control* shall mean the power to vote, directly or indirectly, 25 per centum or more of any class of the voting stock of a company, the ability to control in any manner the election of a majority of a company's directors or trustees, or the ability to exercise a controlling influence over the management and policies of a company.

(g) *An insured state bank will be considered to convert its charter* if the bank undergoes any transaction which causes the bank to operate under a different form of charter than that under which it operated as of December 19, 1991, however, a change from mutual to stock form shall not be considered to constitute a charter conversion.

(h) *Department* means a division of an insured state bank that:

- (1) Is physically distinct from the remainder of the bank;
- (2) Maintains separate accounting and other records;
- (3) Has assets, liabilities, obligations and expenses that are separate and distinct from those of the remainder of the bank; and
- (4) As a matter of state statute, the obligations, liabilities and expenses of which can only be satisfied with the assets of the division.

(i) *Depository institution* means any bank or savings association.

(j) *Equity interest in real estate* means any form of direct or indirect ownership of any interest in real property, whether in the form of an equity interest, partnership, joint venture or other form, which is accounted for as an investment in real estate or real estate joint venture under generally accepted accounting principles or is otherwise determined to be an investment in a real estate venture under Federal Financial Institutions Examination Council Call Report Instructions. The phrase equity interest in real estate does not include the following:

- (1) An interest in real property that is used or intended to be used by the insured state bank or its subsidiaries as offices or related facilities for the

conduct of its business or future expansion of its business;

(2) An interest in real property that is acquired in satisfaction of debts previously contracted for in good faith or acquired in sales under judgments, decrees or mortgages held by the insured state bank or acquired under deed in lieu of foreclosure provided that the property is not intended to be held for real estate investment purposes and is not held longer than the shorter of any time limit on holding such property set by applicable state law or regulation or the time limit on holding such property that is applicable by statute or regulation for a national bank; and

(3) Interests in real property that are primarily in the nature of charitable contributions to community development corporations provided that the contribution to any one community development corporation does not exceed 2 percent of the bank's tier one capital and the bank's total contribution to all such corporations does not exceed 5 percent of the bank's tier one capital, provided however, that the bank's aggregate investment in such interest may be as great as 10 percent of the bank's tier one capital if its appropriate Federal banking agency has determined that making such investments does not pose a significant risk to the deposit insurance fund. In the case of an insured state nonmember bank, making an aggregate investment in interests in real property that are primarily in the nature of charitable contributions up to a maximum of 10 percent of tier one capital shall not be considered to present a significant risk to the deposit insurance fund.

(k) *Equity investment* means any equity security as defined in §362.2(g); any partnership interest; any equity interest in real estate as defined in §362.2(e); and any transaction which in substance falls into any of these categories even though it may be structured as some other form of business transaction, however, the term *equity investment* shall not include any of the foregoing if it is acquired through foreclosure or settlement in lieu of foreclosure.

(l) *Equity security* means any stock (other than adjustable rate preferred stock and money market (auction rate)

preferred stock), certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, or voting-trust certificate; any security immediately convertible at the option of the holder without payment of substantial additional consideration into such a security; any security carrying any warrant or right to subscribe to or purchase any such security; and any certificate of interest or participation in, temporary or interim certificate for, or receipt for any of the foregoing. The term *equity security* does not include any of the foregoing if it is acquired through foreclosure or settlement in lieu of foreclosure.

(m) The phrase *equity investment permissible for a national bank* shall be understood to refer to any equity investment authorized for national banks under the National Bank Act (12 U.S.C. 21 et seq.) or any other statute. Investments expressly authorized by statute or recognized as permissible in regulations, official bulletins or circulars issued by the Office of the Comptroller of the Currency or in any order or interpretation issued in writing by the Office of the Comptroller of the Currency will be accepted as permissible for state banks.

(n) *Executive officer, director, principal shareholder, related interest, and extension of credit* shall have the same meaning as is relevant for the purpose of section 22(h) of the Federal Reserve Act (12 U.S.C. 375) and §337.3 of this chapter.

(o) *Insured state bank* shall mean any state bank insured by the Federal Deposit Insurance Corporation (FDIC) whether or not a member of the Federal Reserve System.

(p) *Investment in a department* by an insured state bank means any transfer of funds by an insured state bank to one of its departments which is represented on the department's accounts and records as an accounts payable, a liability, or equity of the department except that transfers of funds to the department in payment of services rendered by that department shall not be considered an investment in the department.

(q) *Investment in a subsidiary* by an insured state bank shall mean the total of any equity investment in a subsidiary by an insured state bank, any debt issued by the subsidiary that is held by the insured state bank, and any extensions of credit from the insured state bank to the subsidiary.

(r) *Lower income* means income that is less than or equal to the median income for the area in which the qualified housing project is located as determined by state or federal statistics. The “area” in which a housing project is located shall be understood to refer to the relevant Metropolitan Statistical Area (MSA) in which the project is located if the project is located within an MSA. If the project is not located in a MSA, the median income of the “area” in which the project is located shall be understood to refer to the median income of the state or territory in which the project is located exclusive of the designated MSA’s if no state statistics for the local area are available.

(s) *National securities exchange* means a securities exchange that is registered as a national securities exchange by the Securities and Exchange Commission pursuant to section 6 of the Securities Exchange Act of 1934 (15 U.S.C. 78f) and the National Market System, i.e., the top tier of the National Association of Securities Dealers Automated Quotation System (NASDAQ).

(t) *Residents of the state* shall be understood to include companies or partnerships incorporated in, organized under the laws of, licensed to do business in, or having an office in the state.

(u) *Significant risk to the deposit insurance fund* shall be understood to be present whenever there is a high probability that any insurance fund administered by the FDIC may suffer a loss.

(v) *Subsidiary* means any company directly or indirectly controlled by an insured state bank.

(w) *Tier one capital* shall have the same meaning as set forth in Part 325 of this chapter in the case of an insured state nonmember bank and, in the case of an insured state member bank, shall have the same meaning as set forth in regulations defining the term tier one capital as adopted by the bank’s appropriate federal banking agency.

(x) *Well-capitalized* shall have the same meaning as is found in § 325.103(b)(1) of this chapter, however, for the purposes of applying this definition, the terms *risk-weighted assets*, *total capital*, and *total book assets* shall have the respective meaning prescribed in regulations issued by the appropriate federal banking agency. In order to be considered well-capitalized for the purposes of § 362.3(b)(7) and 362.4(c)(2)(i), an insured state bank must meet the above requirements before excluding the bank’s investment in its insurance underwriting department and/or its insurance underwriting subsidiary and the bank must be adequately capitalized after such investment is excluded from the bank’s capital. The term *adequately capitalized* shall have the same meaning as is found in § 325.103(b)(2) of this chapter.

[57 FR 53234, Nov. 9, 1992, as amended at 58 FR 64483, Dec. 8, 1993]

§ 362.3 Equity investments.

(a) *Prohibited investments.* No insured state bank may directly or indirectly acquire or retain any equity investment of a type, or in an amount, that is not permissible for a national bank.

(b) *Exceptions*—(1) *Majority owned subsidiaries.* An insured state bank is not prohibited from acquiring or retaining a majority interest in a subsidiary. If the FDIC denied an application by a Savings Association Insurance Fund (SAIF) member state bank for permission to acquire or retain the majority interest in a subsidiary pursuant to § 333.3 of this chapter, this exception does not apply. If the denial concerned an application for permission to retain the investment, the SAIF member state bank must divest its interest in the subsidiary in accordance with whatever conditions and restrictions are set forth in the FDIC’s order denying the application.

(2) *Qualified housing projects.* (i) Subject to the limitation contained in paragraph (b)(2)(ii) of this section, an insured state bank is not prohibited from investing as a limited partner in a partnership the sole purpose of which is direct or indirect investment in the acquisition, rehabilitation, or new construction of a qualified housing project. A qualified housing project

shall be understood to mean residential real estate intended to primarily benefit lower income persons throughout the period of the bank's investment including but not necessarily limited to any project eligible for the low income housing tax credit under section 42 of the Internal Revenue Code (26 U.S.C. 42). A residential real estate project that does not qualify for the tax credit under section 42 of the Internal Revenue Code may be considered primarily for the benefit of lower income persons if 50 percent or more of the housing units are to be occupied by lower income persons. A real estate project that does not qualify for the tax credit under section 42 of the Internal Revenue Code will be considered residential despite the fact that some portion of the total square footage of the project is utilized for commercial purposes provided that such commercial use is not the primary purpose of the project.

(ii) Investments described in paragraph (b)(2)(i) of this section may only be made if the bank's investment in the partnership, when aggregated with any existing investment in such a partnership or partnerships, does not exceed 2 percent of the bank's total assets as reported on the bank's most recent consolidated report of condition. For the purposes of this section, legally binding commitments are included as part of the bank's investment.

(3) *Savings bank life insurance.* Unless it is otherwise found to pose a significant risk to the insurance fund of which the bank is a member, an insured state bank located in Massachusetts, New York, or Connecticut is not prohibited from owning stock in a savings bank life insurance company provided that the savings bank life insurance company discloses to purchasers of life insurance policies, annuities, and other insurance products that the policies offered to the public are not insured by the FDIC, are not obligations of, and are not guaranteed by, any insured state bank. The following or similar statement will satisfy this requirement: "This [policy, annuity, insurance product] is not a federally insured deposit and is not an obligation of, nor is it guaranteed by, any federally insured bank." The disclosure

must be made prior to the time of purchase, must be prominent, and must be in a separate document clearly labeled "consumer disclosure" if the disclosure does not appear on the face of the policy, annuity or other insurance product. If state law or regulation provides for substantially similar disclosure requirements, compliance with the state imposed disclosure requirements will satisfy the requirements of this paragraph (b)(3).

(4) *Common or preferred stock; shares of investment companies.* (i) To the extent permitted by the FDIC, and subject to the requirements of paragraph (d) of this section, an insured state bank that is located in a state which as of September 30, 1991 authorized investment in:

(A) (1) Common or preferred stock listed on a national securities exchange (listed stock); or

(2) Shares of an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1, et seq.) (registered shares); and

(B) Which during any time in the period beginning on September 30, 1990 and ending on November 26, 1991 made or maintained an investment in such listed stock or registered shares, may retain whatever listed stock or registered shares that were lawfully acquired or held prior to December 19, 1991, and continue to acquire listed stock and/or registered shares.

(ii) The exception provided for by paragraph (b)(4)(i) of this section shall cease to apply to any insured state bank if the bank converts its charter, the bank undergoes any transaction for which notice is required to be filed under section 7(j) of the Federal Deposit Insurance Act (12 U.S.C. 1817(j)) except a transaction that is presumed to be an acquisition of control under §303.4(a) of this chapter, the bank undergoes any transaction subject to section 3 of the Bank Holding Company Act (12 U.S.C. 1842) other than a one bank holding company formation in which all or substantially all of the shares of the holding company will be owned by persons who were shareholders of the bank, the bank is acquired by or merged into a depository institution other than a depository institution described in paragraph (b)(4)(i) of this

section, or control of the bank's parent company changes. In such event the insured state bank may not make any additional investments pursuant to the exception provided for by paragraph (b)(4)(i) of this section. The bank is not prohibited under this section from retaining its existing investments provided that the FDIC does not order a divestiture under paragraph (d)(3) of this section, section 8 of the Federal Deposit Insurance Act (FDI Act, 12 U.S.C. 1818) or some other provision of the FDI Act or FDIC's regulations, or some other provision of law.

(5) *Stock of company that provides director and officer liability insurance.* An insured state bank is not prohibited from acquiring up to 10 percent of the voting stock of a company that solely provides or reinsures directors', trustees', and officers' liability insurance coverage or bankers' blanket bond group insurance coverage for insured depository institutions.

(6) *Shares of depository institutions.* An insured state bank is not prohibited from acquiring or retaining the voting shares of a depository institution if the institution engages only in activities permissible for national banks; the institution is subject to examination and regulation by a state bank supervisor; 20 or more depository institutions own voting shares of the institution but no one institution owns more than 15 percent of the shares; and the institution's voting shares (other than directors' qualifying shares or shares held under or acquired through a plan established for the benefit of the officers and employees) are owned only by depository institutions.

(7) *Interests in insurance subsidiaries.*

(i) A well-capitalized insured state bank is not prohibited from retaining after December 19, 1992 its equity investment in a majority owned subsidiary that was lawfully providing insurance as principal in a state on November 21, 1991 of a sort that could not be so provided by a national bank provided that the activities of the subsidiary continue to be limited to underwriting insurance of the same type provided by the subsidiary as of November 21, 1991 to residents of the state, individuals employed in the state, and any other person to whom the subsidiary

provided insurance as principal without interruption since such person resided in or was employed in the state. In the case of resident companies or partnerships, the subsidiary's activities must be limited to providing insurance to the company's or partnership's employees residing in the state and/or to providing insurance to cover the company's or partnership's property located in the state.

(ii) A bank that does not meet the requirements necessary to be considered well-capitalized for the purposes of paragraph (b)(7)(i) of this section may file an application with the regional director for the Division of Supervision for the region in which the bank's principal office is located requesting permission to retain its insurance underwriting department and/or subsidiary. Such application will be granted solely in the FDIC's discretion but in no event will it be granted unless the FDIC determines that the bank is expected to satisfy the definition of well-capitalized for the purposes of paragraph (b)(7) no later than three years from December 9, 1992, and it is determined that retention of the department and/or subsidiary until the bank meets the definition of well-capitalized will not pose a significant risk to the insurance fund. The application may be in letter form and should contain the bank's plan for meeting the well-capitalized definition before three years from December 9, 1992, taking into consideration the gradual deduction of the bank's investment over that period.

(iii) An insured state bank is not prohibited from retaining after December 19, 1992 its equity investment in a majority owned title insurance underwriting subsidiary provided that the bank was required before June 1, 1991 to provide title insurance as a condition of the bank's initial chartering under state law and none of the transactions described in paragraph (b)(4)(ii) of this section (other than a charter conversion) has occurred since June 1, 1991.

(c) *Divestiture of prohibited equity investments*—(1) *Requirement to divest.* Any equity investment acquired prior to December 19, 1991 that is not of a type, or in an amount, that is permissible for a national bank, and which does not fall within one of the exceptions in

paragraph (b) of this section, must be divested as quickly as prudently possible but in no event later than December 19, 1996. If a SAIF member state bank holds an equity investment that was subject to divestiture pursuant to § 333.3 of this chapter, and the equity investment is subject to divestiture under this paragraph (c)(1) the equity investment must be divested as quickly as prudently possible but in no event later than July 1, 1994 or any earlier date established by a divestiture plan that was filed by the bank under, and approved by the FDIC pursuant to, § 333.3 of this chapter.

(2) *Requirement to file divestiture plan.* Any insured state bank that is required by paragraph (c)(1) of this section to divest an equity investment must submit a divestiture plan with the regional director for the Division of Supervision for the region in which the bank's principal office is located not later than 60 days from December 9, 1992. An insured state bank that has submitted a plan pursuant to this section may proceed to act in accordance with that plan unless and until it is informed in writing by the FDIC that the plan is unacceptable.

(3) *Content of divestiture plan.* The divestiture plan shall:

(i) Describe the obligor, type, amount, book and market values (estimated or known) of the equity investments subject to divestiture as of the bank's most recent consolidated report of condition prior to the filing;

(ii) Set forth the bank's plan to comply with paragraph (c)(1) of this section;

(iii) Describe the anticipated gain or loss (anticipated or realized) if any from the divestiture of the investment and the impact thereof on the bank's capital (including capital ratios before and after the sale);

(iv) Include a copy of a resolution by the bank's board of directors or board of trustees authorizing the filing of the divestiture plan; and

(v) Provide such other information as requested by the regional director.

(4) *Retention of equity investments during divestiture period.* Upon review of the divestiture plan and such additional information as requested by the regional director, and at any time dur-

ing the divestiture period, the FDIC may impose such conditions and restrictions on the retention of the equity investments as the FDIC deems appropriate including requiring divestiture in advance of December 19, 1996.

(d) *Notice and approval of intent to invest in common or preferred stock or shares of an investment company; divestiture of excess investments—(1) Notice and required FDIC determination.* No insured state bank may acquire or retain any listed stock or registered shares pursuant to paragraph (b)(4) of this section unless the bank files a one-time notice with the FDIC setting forth the bank's intention to acquire and retain the listed stock or registered shares and the FDIC has determined that acquiring or retaining listed stock or registered shares will not pose a significant risk to the deposit insurance fund of which the bank is a member. The notice must be filed with the regional director for the Division of Supervision for the region in which the bank's principal office is located.

(2) *Content of notice.* The notice shall contain:

(i) A statement indicating whether the bank made or maintained investments in listed stock and/or registered shares during the period between September 30, 1990 and November 26, 1991;

(ii) The aggregate dollar book value amount of the bank's investment in listed stock and registered shares held as of December 19, 1991 expressed as a percentage of the bank's tier one capital as measured on December 19, 1991 (tier one capital as reported on the bank's December 31, 1991 consolidated report of condition may be used in lieu of calculating tier one capital as of December 19, 1991);

(iii) The aggregate highest dollar book value amount of the bank's investments in listed stock and registered shares between September 30, 1990 and November 26, 1991 expressed as a percentage of tier one capital as reported in the consolidated report of condition for the quarter in which the aggregate high dollar amount of investment occurred;

(iv) A description of the bank's funds management policies and how the bank's investments (planned or existing) in listed stock and/or registered

shares relate to the objectives set out in the bank's funds management policies;

(v) A description of the bank's investment policies and a discussion of to what extent those policies:

(A) Limit concentrations in listed stock and/or registered shares both by issue and by industry;

(B) Set an aggregate limit on investment in listed stock and/or registered shares; and

(C) Deal with the sale of listed stock and/or registered shares in light of market conditions;

(vi) A discussion of the parameters used to determine the quality of the bank's outstanding and proposed investments in listed stock and/or registered shares as well as future investments;

(vii) A copy of a resolution by the board of directors or board of trustees authorizing the filing of the notice; and

(viii) Such additional information as deemed appropriate by the regional director.

(3) *FDIC determination.* Approval of a notice filed under paragraph (d)(1) of this section will not be granted unless the FDIC determines that acquiring and retaining the listed stock and/or registered shares does not pose a significant risk to the insurance fund of which the bank is a member. Approval may be made subject to whatever conditions or restrictions the FDIC determines is necessary or appropriate. The FDIC may require divestiture of some or all of the investments in listed stock or registered shares made during the period from September 30, 1990 to December 19, 1991, as well as any investments in listed stock or registered shares made subsequent to that period if it is determined that retention of the investments in question will have an adverse effect on the safety and soundness of the bank.

(4) *Maximum permissible investment.* (i) The maximum permissible investment in listed stock and registered shares an insured state bank may make pursuant to paragraph (b)(4) of this section may in no event exceed one hundred percent of the bank's tier one capital as measured in its most recent consolidated report of condition. Book value of the investment shall be used for the purposes

of compliance with this limit. Generally, it will be presumed that it does not pose a significant risk to the fund for a well-capitalized bank to acquire and retain listed stock and/or registered shares pursuant to paragraph (b)(4) of this section up to a maximum of one hundred percent of the bank's tier one capital, and absent some mitigating factors, it will also be presumed that it does not present a significant risk to the fund for an adequately capitalized bank to acquire and retain such stock and/or shares up to a maximum of one hundred percent of the bank's tier one capital. It will also be presumed, absent some mitigating factors, that it does present a significant risk to the fund for a bank that is under capitalized to acquire or retain listed stock and/or registered shares in excess of the highest aggregate level of investment made by the bank in such listed stock and/or registered shares during the period from September 30, 1990 to November 26, 1991 expressed as a percentage of the bank's tier one capital as reported by the bank in its consolidated report of condition for the quarter in which the high aggregate investment occurred. "Adequately capitalized" and "under capitalized" shall have the same meaning as is found in §325.103 of this chapter.

(ii) The FDIC, in response to a notice filed under paragraph (d)(1) of this section, may set a percentage as the maximum permissible investment for any insured state bank that is lower than that which would otherwise be applicable under paragraph (d)(4)(i) of this section.

(iii) Any acquisition of listed stock or registered shares by an insured state bank made after December 19, 1991 pursuant to approval of a notice filed under paragraph (d)(1) of this section may not, when made, exceed the maximum permissible investment percentage (as set out in the FDIC's approval of such notice) of the bank's tier one capital as reported on the bank's consolidated report of condition for the period immediately preceding the acquisition.

(5) *Divestiture of excess stock and/or shares.* (i) An insured state bank that held as of December 19, 1991 investments in listed stock and/or registered

shares in an aggregate amount in excess of 100 percent of the bank's tier one capital as measured on December 19, 1991 is prohibited from retaining the excess listed stock and/or registered shares. (Tier one capital as reported on the bank's December 31, 1991 consolidated report of condition may be used in lieu of calculating tier one capital as of December 19, 1991.) Such bank's outstanding investment in listed stock or registered shares must comply by no later than December 19, 1994 with the maximum permissible investment set for the bank by the FDIC in connection with the notice filed pursuant to § 362.3(d)(1) if the bank's maximum permissible investment is 100 percent of tier one capital. In such event, the bank shall divest the excess investment by not less than $\frac{1}{3}$ in each of the three years beginning on December 19, 1991, provided however, that the bank shall be relieved of the obligation to divest at least $\frac{1}{3}$ of its excess investment each year if divesting a lesser amount will reduce the bank's outstanding investment to 100 percent of its current tier one capital. If the bank's maximum permissible investment set by the FDIC is lower than 100 percent of tier one capital, paragraph (d)(5)(ii) of this section shall apply.

(ii) If an insured state bank does not receive approval in connection with a notice filed pursuant to paragraph (d)(1) of this section to retain its outstanding investment in listed stock and/or registered shares, the bank must, as quickly as prudently possible but in no event later than December 19, 1996, divest the listed stock and/or registered shares for which approval to retain was denied. The bank must file a divestiture plan with the regional director for the Division of Supervision for the region in which the bank's principal office is located no later than 60 days after the bank receives notice that approval to retain the investment(s) was denied. The divestiture plan shall contain the information specified in paragraph (c)(3) of this section.

[57 FR 53234, Nov. 9, 1992; 58 FR 59787, Nov. 10, 1993]

§ 362.4 Activities of insured state banks and their subsidiaries.

(a) *General prohibitions.* (1) Except as otherwise provided in this part, after December 19, 1992, an insured state bank may not directly engage as principal in any activity that is not permissible for a national bank, and a majority-owned subsidiary of an insured state bank may not engage as principal in any activity that is not permissible for a subsidiary of a national bank, unless the bank meets and continues to meet the applicable minimum capital standards prescribed by the appropriate federal banking agency and the FDIC determines that the conduct of the activity by the bank and/or its majority-owned subsidiary will not pose a significant risk to the affected deposit insurance fund. Applications for consent to directly, or indirectly through a majority-owned subsidiary, engage as principal in activities that are not permissible for a national bank or a subsidiary of a national bank should be filed in accordance with § 362.4(d). An insured state bank must file an application for each subsidiary regardless of whether the bank previously obtained consent for a subsidiary to engage as principal in the same activity. An insured state bank that obtained the FDIC's consent pursuant to § 333.3 of this chapter prior to that section's repeal to directly or indirectly through a subsidiary engage as principal in an activity that was otherwise impermissible under § 333.3 of this chapter and which is impermissible under this part without the FDIC's consent pursuant to this part in order to continue the activity.

(2) Except as otherwise provided in this part, no insured state bank may directly or indirectly through a subsidiary, engage in insurance underwriting except to the extent such activities are permissible for a national bank.

(b) *Phase-out for banks that do not meet capital standard.* (1) Any insured state bank which does not meet the applicable minimum capital requirements set out in paragraph (a)(1) of this section and which as of December 19, 1992, directly, or indirectly through a subsidiary, engaged as principal in any activity that is not permissible for

a national bank or a subsidiary of a national bank, must cease the impermissible activity as soon as practicable but in no event later than June 8, 1994, unless an extension is granted by the FDIC for good cause.

(2) In no event shall any extension granted pursuant to this paragraph exceed one year from December 8, 1993. If the insured state bank is expected to meet the requisite capital level prior to June 8, 1994, the bank may apply for permission to continue the activity. An insured state bank that does not meet the requisite capital requirements, and which has a majority-owned subsidiary that has equity investments in real estate which are not permissible for a subsidiary of a national bank, must divest the subsidiary or the equity investments in the real estate as soon as practicable but in no event later than December 19, 1996.

(c) *Exceptions*—(1) *Savings bank life insurance*. Any insured state bank that is located in Massachusetts, New York or Connecticut that is otherwise authorized to do so is not prohibited from engaging in the underwriting of savings bank life insurance *provided that*:

(i) The FDIC does not alter its determination made pursuant to section 24(e)(2) of the FDI Act (12 U.S.C. 1831a(e)) that such activities do not pose a significant risk to the insurance fund of which the bank is a member;

(ii) The insurance underwriting is conducted through a division of the bank that meets the definition of “department” contained in §362.2(h); and

(iii) The bank discloses to purchasers of life insurance policies, other insurance products and annuities which are offered to the public that the policies, other insurance products and annuities are not insured by the FDIC and that only the assets of the insurance department may be used to satisfy the obligations of the insurance department. The disclosure must be made prior to the time of purchase of the insurance policy, other insurance product, or annuity; must be prominent; and must be in a separate document clearly labeled “consumer disclosure” if the disclosure does not appear on the face of the policy, other insurance product, or annuity. The following or a similar statement will satisfy the disclosure obligation:

“This [insurance policy, other insurance product, annuity] is not a federally insured deposit and only the assets of the bank’s insurance department may legally be used to satisfy any obligation of that department.” If state law or regulation provides for substantially similar disclosure requirements, compliance with the state imposed disclosure requirements will satisfy the requirements of this paragraph.

(2) *Insurance underwriting*. (i) A well-capitalized insured state bank that was lawfully providing insurance as principal on November 21, 1991 may continue to provide insurance as principal in the state or states in which the bank did so on November 21, 1991 so long as the insurance that is provided is of the same type which the bank provided as of November 21, 1991 and the insurance is only offered to residents of that state, individuals employed in that state, and any other person to whom the bank provided insurance as principal without interruption since such person resided in, or was employed in, that state. In the case of resident companies or partnerships, the bank’s as principal activities must be limited to providing insurance to the company’s or partnership’s employees residing in the state and/or to providing insurance to cover the company’s or partnership’s property located in the state.

(ii) Any insured state bank or any subsidiary thereof that engaged in the underwriting of insurance on or before September 30, 1991 which was reinsured in whole or in part by the Federal Crop Insurance Corporation may continue to do so.

(iii) Any title insurance subsidiary of an insured state bank described in §362.3(b)(7)(iii) may continue to provide title insurance provided that none of the transactions described in §362.3(b)(4)(ii) (other than a charter conversion) has occurred to the parent insured state bank since June 1, 1991.

(3) *Activities that do not present a significant risk*. The FDIC has determined that the following as principal activities do not represent a significant risk to the deposit insurance funds and that the listed activities may therefore be conducted by an insured state bank or its majority-owned subsidiary (as the

case may be) without first obtaining the FDIC's prior consent provided that the bank is otherwise authorized to engage in the activity under state law, the conduct of the activity by the bank and/or its subsidiary is otherwise permitted under federal law and regulation, and the bank meets and continues to meet the applicable minimum capital standards as prescribed by the appropriate federal banking agency. The fact that prior consent is not required by this part does not preclude the FDIC from taking any appropriate action within its authority with respect to the activities if the facts and circumstances warrant such action.

(i) *Guarantee activities.* An insured state bank may:

(A) Directly guarantee the obligations of others as provided for in §347.3(c)(1) of this chapter; and

(B) Directly offer customer-sponsored credit card programs, and similar arrangements, in which the insured state bank undertakes to guarantee the obligations of individuals who are its retail banking deposit customers, *provided, however*, that the bank must establish the creditworthiness of the individual before undertaking to guarantee his/her obligations.

(ii) *Activities that are closely related to banking.* An insured state bank may:

(A) Engage as principal in any activity that is not permissible for a national bank provided that the Federal Reserve Board by regulation or order has found the activity to be closely related to banking for the purposes of section 4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1843(c)(8)), *provided, further however*, That this exception shall not be construed to permit the bank to directly hold equity securities that a national bank may not hold and which are not otherwise permissible investments for insured state banks pursuant to §362.3(b); and

(B) Establish or acquire a majority-owned subsidiary which solely engages as principal in any activity that the Federal Reserve Board by regulation or order has found to be closely related to banking for the purposes of section 4(c)(8) of the Bank Holding Company Act.

(iii) *Securities activities conducted through a subsidiary of an insured non-*

member bank. An insured nonmember bank may conduct securities activities through a subsidiary of the bank in accordance with the requirements and restrictions of §337.4 of this chapter in lieu of any requirement or restriction contained in this part.

(iv) *Equity securities held by a majority-owned subsidiary of an insured state bank—(A) Grandfathered investments in common or preferred stock and shares of investment companies.* Any insured state bank that has received approval to invest in common or preferred stock or shares of an investment company pursuant to §362.3(d) may conduct the approved investment activities through a majority-owned subsidiary of the bank without any additional approval from the FDIC provided that any conditions or restrictions imposed with regard to the approval granted under §362.3(d) are met.

(B) *Bank stock.* An insured state bank may indirectly through a majority-owned subsidiary organized for such purpose invest in up to ten percent of the outstanding stock of another insured bank.

(C) *Stock of a corporation that engages in activities permissible for a bank service corporation.* An insured state bank may indirectly through a majority-owned subsidiary organized for such purpose invest in 50% or less of the stock of a corporation which engages solely in any activity that is permissible for a bank service corporation. (The term "bank service corporation" shall have the same meaning as is relevant for the purposes of the Bank Service Corporation Act (12 U.S.C. 1861 et seq.).) This exception shall not be construed to override any other limitation imposed by this part as to the amount of stock which may be held in a subsidiary without obtaining the FDIC's consent.

(D) *Stock of a corporation which engages in activities which are not "as principal".* An insured state bank may indirectly through a majority-owned subsidiary invest in 50% or less of the stock of a corporation which engages solely in activities which are not considered to be "as principal" as that term is defined in §362.2(c).

(v) *Investments in adjustable rate and money market preferred stock.* An insured state bank may invest up to 15 percent

of the bank's total capital (as that term is defined by the appropriate federal banking agency) in adjustable rate preferred stock and money market (auction rate) preferred stock.

(d) *Application for consent to directly, or indirectly through a majority-owned subsidiary, engage as principal in an activity that is not permissible for a national bank—(1) Timing and place of filing application.* All applications for consent pursuant to paragraph (d) of this section should be filed with the regional director for the Division of Supervision for the FDIC regional office in which the insured state bank's principal office is located. Applications for consent to continue an activity in which an insured state bank and/or its majority-owned subsidiary was engaged as of December 19, 1992, must be filed with the appropriate regional office no later than February 7, 1994.

(2) *Continuation of activity while application is pending.* Any insured state bank which has filed an application in accordance with paragraph (d)(1) of this section requesting consent to directly or indirectly continue any ongoing activity may continue to engage in the activity while the application is pending provided, however, in no event may such an insured state bank or its subsidiary continue the activity for more than six months from the receipt of the application by the appropriate FDIC regional office unless the FDIC grants an extension or approval of the application has been granted.

(3) *Copy of application filed with another agency.* Unless the FDIC requests additional information, in a case in which an insured state bank has sought the approval of another federal or state regulatory authority to directly or indirectly engage in an activity for which consent is required under this part, the application filing requirements of paragraph (d) of this section may be satisfied by submitting to the FDIC a copy of the request as filed with such other regulatory authority provided that the request as filed with such authority substantially satisfies all of the information requirements of paragraph (d) of this section.

(4) *Form and content of application—(i) Form.* Applications filed pursuant to § 362.4(d) may be in letter form.

(ii) *Applications for consent to directly engage as principal in activities that are not permissible for a national bank.* Applications for consent to begin for the first time to directly engage as principal in any activity that is not permissible for a national bank, as well as applications for consent to continue to conduct as principal an activity in which a bank was engaged as of December 19, 1992 which is not permissible for a national bank, shall contain the following:

(A) A brief description of the activity, the manner in which it is or will be conducted, and the present and expected volume or level of the activity;

(B) A copy, if any, of the bank's feasibility study, financial projections and/or business plan regarding the conduct of the activity;

(C) A citation to the state statutory or regulatory authority for the conduct of the activity;

(D) A copy of the order or other document from the appropriate regulatory authority granting approval for the bank to conduct the activity if such approval is necessary and has already been granted;

(E) A copy of a resolution by the bank's board of directors or trustees authorizing the filing of the application;

(F) A brief description of the bank's policy and practice with regard to any present or anticipated involvement in the activity by a director, executive officer or principal shareholder of the bank or any related interest of such a person;

(G) A description of the bank's expertise in the activity; and

(H) Such other information as requested by the FDIC.

(iii) *Applications for consent to engage as principal through a majority-owned subsidiary in activities that are not permissible for a subsidiary of a national bank.* Applications for consent to begin for the first time to conduct, as principal, through a majority-owned subsidiary activities that are not permissible for a subsidiary of a national bank, as well as applications for consent for the bank's majority-owned subsidiary to continue to conduct, as principal, activities in which the bank's subsidiary was engaged as of

December 19, 1992 that are not permissible for a subsidiary of a national bank, shall contain the following information:

(A) The information described in paragraph (d)(4)(ii) of this section;

(B) The amount of the bank's existing and proposed investment in the subsidiary; and

(C) The bank's investment in other subsidiaries conducting the same type of activity.

(iv) If an insured state bank previously obtained consent for a majority-owned subsidiary to engage as principal in a particular activity, any subsequent request for consent for another subsidiary of the bank to engage as principal in the same activity may omit the information described in paragraph (d)(4)(ii) of this section.

(5) *Phase-out of activities for which consent to continue has been denied*—(i) *Direct activity.* If a request filed pursuant to paragraph (d) of this section for consent to continue the direct conduct of an activity is denied, the bank must cease the activity as soon as practicable but in no event later than one year from the denial unless the FDIC specifically sets a different time which may in the FDIC's sole discretion be longer than one year. The FDIC may condition or restrict the conduct of the activity during the phase-out period as is deemed necessary in order to protect the affected deposit insurance fund.

(ii) *Activity in a majority-owned subsidiary.* If a request filed pursuant to paragraph (d) of this section for consent to continue the conduct of an activity through a majority-owned subsidiary of the bank is denied, the bank must divest its equity investment in the subsidiary as quickly as prudently possible but in no event later than December 19, 1996. The bank shall file a divestiture plan in accordance with § 362.3(c)(3) no later than 60 days after the bank receives notice that consent was denied. In the alternative, the bank may choose to discontinue the activity rather than divest its equity investment in the subsidiary in which case the activity must be discontinued as soon as practicable but in no event later than one year from the denial unless the FDIC specifically sets a different time period which may, in the

FDIC's sole discretion, be longer than one year. If the bank elects to discontinue the activity rather than to divest the subsidiary, the bank must notify the FDIC of that decision no later than 60 days after the bank receives notice that consent was denied. The notice must be in writing and should be filed with the appropriate FDIC regional office. If an insured state bank is denied consent to continue impermissible equity investments in real estate through a majority-owned subsidiary and the bank elects to discontinue those investments rather than divest the subsidiary, the period of time which the subsidiary shall have to divest the equity investments in real estate shall not extend beyond December 19, 1996. The FDIC may condition or restrict the conduct of any activity during the phase-out period as it deems necessary in order to protect the affected deposit insurance fund.

(e) *Disclosures.* Except as otherwise provided herein, any approval of an application filed pursuant to § 362.4(d) shall be subject to the condition that the bank and/or subsidiary shall provide any persons doing or about to do business with the bank and/or subsidiary written disclosure that the products, goods or services offered by the bank and/or subsidiary are not insured by the FDIC. If the products, goods or services are offered by a subsidiary of the bank, the disclosure must also indicate that the products, goods or services are not guaranteed by the bank and that only the assets of the subsidiary are available to satisfy the obligations of, or any contractual claims arising in connection with, the operation of the subsidiary. If the products, goods or services are offered by a department of the bank, the disclosure must indicate that only the assets of the department are available to satisfy the obligations of the department. Disclosures must occur prior to the time any contractual obligation to purchase any product, good or service arises; must be prominent; and must be clearly labeled "customer disclosure". If any communications from the bank to its depositors contain advertisements, promotions, or solicitations pertaining to the activities of the bank or its subsidiary which were approved pursuant

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to § 362.4(d) those communications must contain a disclosure that the products, goods or services are not insured by the FDIC. Disclosures will not be imposed under this part if state law or regulation establishes disclosure requirements which are substantially similar to those contained in this paragraph. Disclosure that the product, good or service is not an insured deposit will not be required if it is determined by the FDIC that the likelihood of confusing the product, good, or service with an insured deposit is minimal.

(f) *Conditions.* Approvals granted pursuant to § 362.4(d) may be made subject to any conditions or restrictions found by the FDIC to be necessary to protect the bank and/or the deposit insurance funds from risk, to prevent unsafe or unsound banking practices, and/or to ensure that the activity is consistent with the purposes of federal deposit insurance.

(g) *Conditions and restrictions applicable to insured state banks and/or their subsidiaries that engage in insurance underwriting activities excepted under § 362.3(b)(7) or § 362.4(c)(2)(i).* (1) No insured state bank may directly or indirectly through a subsidiary underwrite insurance pursuant to the exception contained in § 362.3(b)(7) or § 362.4(c)(2)(i) unless the following conditions and restrictions are met:

(i) Any insurance underwriting directly conducted by the bank must be done through a division of the bank that meets the definition of "department" contained in § 362.2(h);

(ii) Any subsidiary that underwrites insurance must meet the definition of a "bona fide subsidiary" contained in § 362.2(d); and

(iii) The disclosure requirements of § 362.3(b)(3) and/or § 362.4(c)(1)(iii) are met to the same extent as they would be applicable if the bank and/or its subsidiary were conducting savings bank life insurance activities.

(2) Any insured state bank or a subsidiary of an insured state bank that would be eligible for the exception in § 362.3(b)(7) or § 362.4(c)(2) but for the requirements of paragraphs (g)(1)(i) or (g)(1)(ii) of this section may continue to conduct the insurance underwriting activities provided that the requirements of paragraph (g)(1)(iii) of this

section are met and provided that the requirements of paragraphs (g)(1)(i) and (g)(1)(ii) of this section are met no later than one year from December 8, 1993.

[58 FR 64484, Dec. 8, 1993]

§ 362.5 Notification of exempt insurance activities.

Any insured state bank that was lawfully underwriting insurance in a state on November 21, 1991, and any insured state bank that has a subsidiary that was lawfully underwriting insurance in a state on November 21, 1991, shall submit a notice to the regional director for the Division of Supervision for the region in which the bank's principal office is located not later than 60 days from December 9, 1992, if those insurance underwriting activities would not be permissible for a national bank or a subsidiary of a national bank. The notice requirement does not apply in the case of an insured state bank described in § 362.3(b)(7)(ii). The notice shall contain the following information:

(a) The name of the bank and/or subsidiary;

(b) The state or states in which the bank and/or its subsidiary was underwriting insurance on November 21, 1991;

(c) A recitation of the authority for the bank or subsidiary to conduct insurance underwriting activities;

(d) A list of the types of insurance that the bank and/or subsidiary provided to the public as of November 21, 1991 in the state(s) identified in paragraph (b) of this section. For purposes of this list, various lines of insurance are considered to be distinct types of insurance.

[57 FR 53234, Nov. 9, 1992. Redesignated at 58 FR 64483, Dec. 8, 1993]

§ 362.6 Delegation of authority.

The authority to review and act upon divestiture plans submitted pursuant to § 362.3(c)(2); the authority to approve or deny notices filed pursuant to § 362.3(d); the authority to approve or deny applications pursuant to § 362.3(b)(7)(ii); and the authority to approve or deny requests for consent pursuant to § 362.4(d) as well as to take any other action authorized by § 362.4(d) is

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delegated to the Director of the Division of Supervision or the Director's designee.

[60 FR 31384, June 15, 1995]

PART 363—ANNUAL INDEPENDENT AUDITS AND REPORTING REQUIREMENTS

Sec.

363.0 OMB control number.

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APPENDIX A TO PART 363—GUIDELINES AND INTERPRETATIONS

AUTHORITY: 12 U.S.C. 1831m.

SOURCE: 58 FR 31335, June 2, 1993, unless otherwise noted.

§ 363.0 OMB control number.

The collecting of information requirements in this part have been approved by the Office of Management and Budget under OMB control number 3064-0113.

§ 363.1 Scope.

(a) *Applicability.* This part applies with respect to fiscal years of insured depository institutions which begin after December 31, 1992. This part does not apply with respect to any fiscal year of any insured depository institution, the total assets of which, at the beginning of such fiscal year, are less than \$500 million.

(b) *Compliance by subsidiaries of holding companies.* (1) The audited financial statements requirement of § 363.2(a) may be satisfied for an insured depository institution that is a subsidiary of a holding company by audited financial statements of the consolidated holding company.

(2) The other requirements of this part for an insured depository institution that is a subsidiary of a holding company may be satisfied by the holding company if:

(i) The services and functions comparable to those required of the insured depository institution by this part are provided at the holding company level; and

(ii) The insured depository institution has as of the beginning of its fiscal year:

(A) Total assets of less than \$5 billion; or

(B) Total assets of \$5 billion or more and a composite CAMEL rating of 1 or 2.

(3) The appropriate federal banking agency may revoke the exception in paragraph (b)(2) of this section for any institution with total assets in excess of \$9 billion for any period of time during which the appropriate federal banking agency determines that the institution's exemption would create a significant risk to the affected deposit insurance fund.

[58 FR 31335, June 2, 1993, as amended at 61 FR 6493, Feb. 21, 1996]

§ 363.2 Annual reporting requirements.

(a) *Audited financial statements.* Each insured depository institution shall prepare annual financial statements in accordance with generally accepted accounting principles which shall be audited by an independent public accountant.

(b) *Management report.* Each insured depository institution annually shall prepare, as of the end of the institution's most recent fiscal year, a management report signed by its chief executive officer and chief accounting or chief financial officer which contains:

(1) A statement of management's responsibilities for preparing the institution's annual financial statements, for establishing and maintaining an adequate internal control structure and procedures for financial reporting, and for complying with laws and regulations relating to safety and soundness which are designated by the FDIC and the appropriate federal banking agency; and

(2) Assessments by management of the effectiveness of such internal control structure and procedures as of the end of such fiscal year and the institution's compliance with such laws and regulations during such fiscal year.

§ 363.3 Independent public accountant.

(a) *Annual audit of financial statements.* Each insured depository institution shall engage an independent public accountant to audit and report on its